
HOW TO REFRESH MEMORY ON DIRECT § 90.613

When witness says, “I don’t remember”

1. Elementsⁱ

- Witness knows the facts, but has a memory lapse on the stand
- Witness knows the report (or other document or exhibit) will refresh their memory
- Witness is given and reads the pertinent part of their report
- Witness states their memory has now been refreshed
- Witness now testifies to what he knows, without further aid of the report.

PRACTICE TIP:

- ✓ Ask “Do you recall or do you remember”
- ✓ Mark the exhibit (it should be marked for identification purposes even though it is not offered into evidence – no need to lay foundation for the document)
- ✓ Show to opposing counsel, they are entitled to inspect the writing and cross-examine the witness concerning it §90.613
- ✓ Be sure to get the exhibit back from the witness before you ask the questions (otherwise opposing counsel can object that the witness is just reading from the report)

2. Sample Questions to Refresh Memory on Direct

- a. Do you recall ...
- b. Would anything refresh your memory
- c. What would that be?
- d. Your Honor, I ask this ____ be marked as guardian ad litem Exhibit 2
- e. I am showing the _____ to opposing counsel _____
- f. May I approach the witness?
- g. Do you recognize this?
- h. What is it?
- i. Please read paragraph...
- j. (get the exhibit back from the witness).
- k. Re-ask the question, which drew the original failure of memory.

Refreshing recollection must be distinguished from past recollection recorded. If the witness has no present memory of the fact after examining the document or notes, the witness will not be permitted to read from the document or notes unless they are admitted into evidence. Since writings are typically hearsay, they will not be admitted unless they qualify as an exception to the hearsay rule.ⁱⁱ

3. Objections to refreshing recollection under § 90.613ⁱⁱⁱ

- a. I object to the attempt to refresh the witness’s recollection in the absence of a demonstrated failure of memory (remember to ask: “Do you recall or do you remember”)
- b. I object to the witness’s reading from the exhibit used to refresh recollection because it is not in evidence and because it is hearsay (remember to take the exhibit away from witness before you continue to ask questions)

4. Responses

- a. The witness has shown a failure of memory and I am attempting to refresh his or her recollection pursuant to § 90.613, Florida Statutes.

ⁱ Thomas A. Mauet, *Trial Techniques* (Sixth Edition) p.145.

ⁱⁱ Charles W. Ehrhardt, *Florida Evidence* (2002 Edition) p. 561

ⁱⁱⁱ Anthony Bocchino and David Sonenshein, *Federal Rules of Evidence with Objections*, 6th ed.(NITA 2003) 136-137.